90-419

NO. _____

IN THE

Supreme Court of the United States

October Term, 1990

JOHN DOE,

Petitioner,

v.

BOROUGH OF CLIFTON HEIGHTS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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September 5, 1990

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. Section 1983, which creates a right of action against "any person" who deprives another or causes another to be deprived of his rights under federal law, makes violations of private rights under a federal funding statute actionable only against recipients of federal funds under that statute.

2. Whether qualified immunity is available in a suit under Section 1983 to those who violate established state and federal statutory law, simply because they did not think that they would subsequently be held liable for damages under Section 1983.

INDEX

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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The petitioner John Doe respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in favor of respondents the Borough of Clifton Heights, Robert Keates, Officer Zimath, Richard Roes #1, the Delaware County Prison, the Delaware County Prison

Board, Kenneth Matty, David W. Jones, and Richard Roes #2, entered in this proceeding on April 13, 1990.

OPINION BELOW

The order of the Court of Appeals, not yet reported, appears in the Appendix hereto at A-12. The opinion of the District Court for the Eastern District of Pennsylvania, reported at 719 F. Supp. 382, appears in the Appendix hereto at A-1.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on April 13, 1990. A timely petition for rehearing and for rehearing en banc was denied on June 7, 1990, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section

1254(1). The jurisdiction of the courts below was invoked pursuant to 28 U.S.C. Sections 1291, 1294, 1331, 1343 & 2201.

QUESTIONS PRESENTED

1. Whether 42 U.S.C. Section 1983, which creates a right of action against "any person" who deprives another or causes another to be deprived of his rights under federal law, makes violations of private rights under a federal funding statute actionable only against recipients of federal funds under that statute.

2. Whether qualified immunity is available in a suit under Section 1983 to those who violate established state and federal statutory law, simply because they did not think that they would subsequently be held liable for damages under Section 1983.

STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue in this case are United States Code, Title 42, Sections 1983 and 5633. The text of the relevant portion of these provisions are set out in the Appendix at A-16.

STATEMENT OF THE CASE

This case is a civil rights action for damages brought by Petitioner against individual police officers and the Borough of Clifton Heights, Pennsylvania, as well as individual prison officials and the governing authority of the Delaware County (Pennsylvania) Prison.

The crucial facts as this matter comes before this Court are not in dispute: First, that the plaintiff in this civil rights action was a juvenile at the time of the events in question.

Second, that he was sent to an adult prison, where he was celled with adult offenders. And third, that state and federal law both prohibit incarcerating a juvenile in an adult facility and celling him with adults.

John Doe, now a young adult, was a 17-year-old when, on the night of November 14, 1987, he was arrested by police officers Keates and Zimath in Clifton Heights, a Philadelphia suburb, joy-riding in a stolen car. In the ensuing hours, Keates, Zimath, and other police officers simply denied the truth that this young man was a juvenile, see, e.g., Depo. Tr. of Keates at 11-12, 27-28, despite his assertions being backed by an identification card showing him to be a juvenile, see id., Exh. 1, and positive verification of his age and identity by a member of his own family. See Depo. Tr. of Arthur Oliver at 21-27.

Instead, they had him committed to the local adult prison.

Officials at the Delaware County Prison denied that they had authority to refuse to receive and house John Doe despite his age. No attempt to verify his age -- or any of his background information -- was made except via standard state criminal history background check, which took on average one week. See Depo. Tr. of prison officer Pelliriti at 57, 63, 65; Depo. Tr. of prison officer Farina at 92. Instead, the prison's policy allowed juveniles wrongfully detained at the prison to prove their age only by telephoning family members who could then produce a birth certificate. See Depo. Tr. of Pelliriti at 60-61; Depo. Tr. of Farina at 103-06, 125-29. Such phone calls were only available, however, during approximately the first hour after

a prisoner arrived at the Intake Unit, and during sessions with prison counsellors. See Depo. Tr. of Pellirit at 64. Thus, Petitioner was afforded no opportunity to reach his family and obtain a birth certificate to prove his age to the prison's satisfaction, from being locked up at approximately noon on Saturday until his counseling session almost 48 hours later. Id.

Neither was any attempt made to segregate John Doe from adults, pending his identification as an adult or a juvenile: At the time, there was no policy of celling juveniles, or individuals who claimed to be juveniles, separately from adults at Delaware County Prison. See Depo. Tr. of Farina at 123. John Doe was thus celled with five serious adult offenders with extensive records, on a row of cells housing many other, similar adult prisoners. Within

2-1/2 months after this incident, however, a policy was instituted in the intake unit segregating juveniles. See Memorandum dated 1-28-88 from Gene Farina to Deputy Warden Walrath, App. on Appeal at 36.

John Doe spent two nights in the prison. He alleges (and this the respondents dispute) that he was sexually assaulted on the second. Doe asserts that the rapist entered and escaped from his cell through the unlocked door, during the late-night medical exams administered to new arrivals. See Depo. Tr. of Petitioner at 41-48 & Exh. 1. New commitments were removed from their cells for such exams and brought downstairs between approximately 1:00 and 2:00 a.m. each night; unmonitored access between cells was possible during that hour. See, e.g., Answers of Delaware County

Prison Defendants to Interrogatories, para. 10, App. on Appeal at 63.

John Doe was finally transferred to a nearby juvenile facility, and eventually released on six-months probation, which expired without further incident.

On November 8, 1988, Doe filed this civil rights action in the United States District Court for the Eastern District of Pennsylvania, claiming damages from an unlawful and unconstitutional commitment as a juvenile to an adult prison facility and celling amongst adult prisoners, and from a sexual assault resulting therefrom.

On defendants' motions for summary judgment and plaintiff's cross-motion for partial summary judgment, the district court granted summary judgment for all defendants and against the plaintiff. The court issued a memorandum opinion.

This opinion was upheld by the Court of Appeals in a judgment order. Rehearing and rehearing en banc were denied, and leave to file an extraordinary petition for rehearing and rehearing en banc, in light of an opinion of this Court delivered the day before issuance of the appellate court's mandate in this matter, was also denied. This petition follows.

REASONS FOR GRANTING THE WRIT

Since its decision in Maine v. Thiboutot, 448 U.S. 1 (1980), this Court has faced recurring questions about private rights arising under federal statutes enforceable through the so-called "laws prong" of 42 U.S.C. Section 1983. In the last Term alone, the Court twice tackled this subject. Wilder v. Virginia Hospital Association, 58 U.S.L.W. 4795 (June 14, 1990), and Golden State Transit Corp. v. City of Los Angeles, 493 U.S. ___ (1989).

This case presents a novel and significant question in this area, decided by the courts below in a manner that conflicts with existing precedent. This petition also presents a second question as to the doctrine of qualified immunity that is significant and was decided by the courts below in a manner that conflicts with existing precedent.

1. THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF THIS COURT, OF THE THIRD CIRCUIT, AND OF OTHER COURTS OF APPEALS, THAT DEPRIVATION OF A FEDERAL STATUTORY RIGHT IS ACTIONABLE UNDER SECTION 1983 AGAINST ANY PERSON WHO DEPRIVES ANOTHER OF THAT RIGHT.

Petitioner has brought this civil rights action under Section 1983 for violation of his federal statutory rights under the Juvenile Justice and Delinquency Prevention Act and the Juvenile Justice Act. See especially 42 U.S.C. Secs. 5633.

Under these statutes and their accompanying regulations (hereinafter referred to collectively as "JJDPA"), Congress has mandated that, in general, States not incarcerate juveniles in the same facility as adults. In the rare instances in which incarceration in the same facility as adults is actually

permitted,[1] juveniles must be kept separate from adults as to both sight and sound. See 42 U.S.C. Secs. 5633(a)(12),(13) & (14). At issue, then, is federal law enacted in large part to protect individuals like Petitioner from precisely the harm that befell him in this case.

The opinion below agreed that under the reasoning of Thiboutot and its progeny, the JJDPA must be read to create a federal right, inuring to individuals such as Petitioner, not to be

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[1] The only situation relevant to this case is that juveniles arrested or taken into custody for committing an act that would be a crime if committed by an adult may be temporarily held for a maximum of six hours in an adult facility for purposes of identification, processing, or transfer to other facilities. See 28 C.F.R. Secs. 31.303(f)(5)(iv)(G) and (H).

incarcerated in an adult facility or amongst adult offenders.[2] The court then adopted the novel view that an action under Section 1983 for violation of

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[2] The lower courts have split as to whether the JJDPA creates a private right actionable under Section 1983. The court in Doe v. McFaul, 559 F. Supp. 1421 (E.D. Ohio 1984), decided before Wright v. City of Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987), found that the federal provisions at issue here did not create a private right of action. (Wright suggested that perhaps third-party mandates such as that contained in the JJDPA might not be found to create a private right of action under Section 1983.) The McFaul court nonetheless held that incarceration of juveniles in an adult jail did violate the juveniles' constitutional rights.

Henrickson v. Griggs, 672 F. Supp. 1126, 1133-37 (C.D. Iowa 1987), and the opinion below, see Appendix at A7-A8, however, both decided after Wright, held that a private right of action was created under the Juvenile Justice Act and Section 1983. Under Wright, the Henrickson opinion recognized, a court looks merely to the mandatory nature of the defendant's obligation and the clarity of Congress' intent to benefit individuals such as the plaintiff.

Petitioner's rights under a federal statute can only be brought against an offender who is personally the recipient of federal funds under the statute. That holding is contrary to existing precedent and to the plain language of Section 1983, and is dangerous to the continued vindication of all constitutional rights under Section 1983.

The decisions in this case denying John Doe his right to proceed under Section 1983 conflict most clearly with the methodological distinction, between Section 1983 and implied-right-of-action cases, drawn by the Court at the outset of its analysis in Virginia Hospital:

> In implied right of action cases, we employ the four-factored Cort [v. Ash, 422 U.S. 66 (1975)] test to determine "whether Congress intended to create the private remedy asserted" for the violation of statutory rights. The test reflects a concern, grounded in separation of powers, that Congress rather than

> the courts controls the availability of remedies for violations of statutes. Because Section 1983 provides an "alternative source of express congressional authorization of private suits," these separation of powers concerns are not present in a Section 1983 case. Consistent with this view, we recognize an exception to the general rule that Section 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy.

Virginia Hospital, 58 U.S.L.W. at 4798 n.9 (emphasis in original) (citations omitted).

Thus, the lower court's conclusion that "I cannot . . . find that in enacting this statute Congress intended to extend this private right of action to cover suits against individual arresting officers," Appendix at A-9, is entirely inappropos. Its holding that "Congress intended to provide a private right of action only against state and/or local agencies eligible for funding under the Act," id., might arguably be correct as

to a Cort v. Ash implied right of action, but it is utterly inapplicable -- and incorrect -- as to the question of a right of action under Section 1983 against the arresting officers, prison officials, or, for that matter, "any person," see 42 U.S.C. Section 1983, who caused John Doe to be deprived of his rights under the JJDPA.

The holding below is irreconcilable with not only the plain language of Section 1983 but also the Section 1983 principles declared by this Court. Virginia Hospital leaves no doubt as to that:

> "'We do not lightly conclude that Congress intended to preclude reliance on Section 1983 as a remedy' for the deprivation of a federally secured right." The burden is on the State to show "by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." In the absence of such an express provision, we have found private

> enforcement foreclosed only when the statute itself created a remedial scheme that is "sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under Section 1983."

Virginia Hospital, 58 U.S.L.W. at 4801 (citations omitted). Needless to say, neither the defendants nor any court has cited any "express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement" of the JJDPA, because there is none. Enforcement of JJDPA rights under Section 1983 thus can be denied only if a "sufficiently comprehensive" alternative remedial scheme exists under the JJDPA -- and not simply if the state actor otherwise liable under Section 1983 has not personally received federal funds under the statute.

It is worth assaying briefly just how strongly the Virginia Hospital Court

phrased the requirement of an alternative remedial scheme, as it indicates this Court's great reticence toward denying a "laws prong" right of action under Section 1983. After noting that "[o]n only two occassions have we found a remedial scheme established by Congress sufficient to displace the remedy provided in Section 1983," the Court asserted:

> The Medicaid Act contains no comparable provision for private judicial or administrative enforcement. Instead, the Act authorizes the Secretary to withhold approval of plans, [citation omitted], or to curtail federal funds to States whose plans are not in compliance with the Act.. . .

Id. The Court therefore conluded definitively that "[t]his administrative scheme cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of Section 1983." Id.

But that is also essentially the administrative scheme established by the JJDPA.

The JJDPA, moreover, similarly to most federal grant-in-aid programs, does not provide for federal grants to individual police officers or prison guards. The Act provides federal funds to States, on the condition that the State then ensure compliance with the JJDPA's requirements by all its prisons, police departments, prison guards, and police officers. Prison and municipal entities are creatures of the States, and, so far as the federal government is concerned, police officers and prison guards are agents of the State.

To ask whether the individual officers or entities who are defendants here personally received federal funds under the JJDPA is to ask the wrong question: The question under the statute

is whether Pennsylvania accepted such funds, and acceded to the attendant condition that all its officers -- including Corporal Keates, Officer Zimath, and Warden Matty -- obey state and federal laws regarding the incarceration of juveniles. The fact that Pennsylvania has done so, and has enacted appropriate legislation, is a matter of public record. All the defendants in this action are bound by the requirements of those laws and the JJDPA. There can be no clearer example of persons "acting under color of state law."

This Court recently reemphasized that "the coverage of [Section 1983] must be broadly construed.. . . It provides a remedy 'against all forms of official violation of federally protected rights.' . . . The burden to demonstrate that Congress has expressly withdrawn the

remedy is on the defendant." Golden State Transit Corp. v. City of Los Angeles, 58 U.S.L.W. 4033, 4034 (Dec. 5, 1989). There is no intimation, in that or any other Supreme Court decision, that there is ever a question of withdrawing the remedy as to only a subset of potential defendants.

Under the language of Section 1983 itself, of course, such a result would not even be possible. Section 1983 by its terms creates a cause of action against any person who causes the deprivation of any federal right; once a "right" is established, anyone (acting under color of state law) who causes the deprivation of that right is liable -- even if the right were not enforceable against that individual initially.

If it were otherwise, individuals could never be sued under Section 1983 for deprivations of even constitutional

rights: Like the requirements imposed under the JJDPA, constitutional rights run not against individuals but against governments; one has no constitutional right vis-a-vis other individuals to freedom of speech, or due process of law, or freedom from cruel and unusual punishment. But if any individual acts, under color of state law, to deprive another of any such rights held vis-a-vis the government, Section 1983 creates a right of action against that individual.

To hold otherwise -- that Section 1983 liability is limited to those entities upon whom a substantive duty is imposed by the original, underlying federal provision -- would vitiate Section 1983 as a vehicle for the protection not only of federal statutory rights, but also of constitutional rights. The decision of the courts below therefore threaten the underpinnings of

all judicial protection of constitutional rights against invasion by state actors. The doctrine propounded by the district court and let stand by the Third Circuit is thus of great menace and import; it conflicts with both the established precedent and the clearest, most forceful, and most recent ruling of this Court in this area of law. These reasons justify the grant of certiorari to review the judgment below.

2. THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF THIS COURT AND RAISE A SIGNIFICANT QUESTION IN HOLDING THAT QUALIFIED IMMUNITY IS AVAILABLE TO THOSE WHO VIOLATE ESTABLISHED STATE AND FEDERAL STATUTORY LAW.

As an alternative ground for denying Petitioner relief, the decision below held that the individual officers were protected from liability by the doctrine of qualified immunity, because "the

question of whether the Act creates a right in favor of individual plaintiffs is a difficult one. The answer is not one that individual officers reasonably should have known." Appendix at A-11.

This ruling is contrary to the decisions of both this Court and the Third Circuit. At issue under this claim is a statutory obligation, knowledge of which respondents can hardly disclaim.

There is simply no immunity when an officer should know -- or does know --that his actions are unlawful. Malley v. Briggs, 475 U.S. 335, 345 (1986). "When a right is well established, as the Eighth Circuit recently said, 'no one who does not know about it can be called 'reasonable' in contemplation of law.'" Losch v. Borough of Parkesburg, 736 F.2d 903, 910 (3d Cir. 1984) (quoting Goodwin v. Circuit Court, 729 F.2d 541, 546 (8th Cir. 1984)). Thus, the respondents must

argue -- and the courts below accepted -- that officers should not be held liable for their knowingly unlawful conduct if they were simply uncertain that a private right of action for damages existed against them.

This is an extremely cynical perversion of the law of immunity, and one for which Petitioner can find no support in prior caselaw. Immunity is intended to provide officers with needed flexibility to act in circumstances in which they could not know that a legal prohibition against their actions would later be found. Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982). It charts new -- and distressing -- ground to extend immunity to situations in which officers know or should know that their actions are plainly unlawful, and the only uncertainty the officers have is whether they can "get away with" their

knowingly unlawful conduct without paying damages. Such a novel doctrine justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, this Court should grant the writ of certiorari in this matter, and either set the cause for argument on the merits, or, in the interests of justice and judicial economy, summarily reverse the decision below or vacate the judgment and remand to the Court of Appeals for further proceedings consistent with the prior decisions of this Court.

Respectfully submitted,

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September 5, 1990

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DOE, Plaintiff,	:	
v.	:	No. 88-8562
BOROUGH OF CLIFTON HEIGHTS, ET AL., Defendants.	:	

MEMORANDUM

On November 14, 1987, police officers arrested plaintiff John Doe, a juvenile. Plaintiff stated that he was a juvenile and provided the officers with a Pennsylvania Personal Identification Card confirming his juvenile status. Arresting officers Keates and Zimath questioned plaintiff repeatedly about his date of birth; at one point, plaintiff "fumbled."

Plaintiff informed the arresting officers that he had a valid Pennsylvania

driver's license, but did not have the license with him. When Officer Keates ran a computer search for the license, he discovered a valid license under the same name as plaintiff's, but which bore an adult date of birth. This driver's license contained a different street address than the one shown on plaintiff's identification card, but Officer Keates was informed (incorrectly) that the two addresses were in the same area. Keates did not consider plaintiff's identification card reliable, and his experience led him to believe that an individual using a false address typically chooses one from his own neighborhood. Taking the conflicting information into account, Keates incorrectly determined that plaintiff was an adult. Plaintiff was incarcerated with adult offenders for approximately 60 hours.

In this action, plaintiff brings four distinct claims against the arresting officers, the municipality of Clifton Heights and the Delaware County Prison. Plaintiff claims that defendants' actions violated: (1) his federal statutory rights under the Juvenile Justice and Delinquency Prevention Act and the Juvenile Justice Act, 42 U.S.C. secs. 5633(a)(12)-(14), which prohibit states from incarcerating juveniles in the same facility as adults except under limited circumstances; (2) his substantive due process rights; (3) his procedural due process rights; and (4) his eighth amendment right to be free from assault by fellow prisoners.

The Municipal Defendants: Borough of Clifton Heights and Delaware County Prison

Rule 56(c) "mandates the entry of summary judgment, after adequate time for

discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue of material fact. . . .'" Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

As the Supreme Court recently stated, "our first inquiry in any case alleging municipal liability under section 1983 is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." City of Canton v. Haris, slip op. at 7 (Feb. 28, 1989). Here, the record contains no evidence of any municipal policy or custom, formal or informal, of incarcerating juveniles with adult offenders. The experience of John Doe

appears to have been an isolated incident. As a result, this Court must grant summary judgment in favor of the municipal defendants on all of plaintiff's claims.

The Individual Defendants: Corporal Keates and Officer Zimath

1. Plaintiff's constitutional due process claims

To succeed on his substantive and procedural due process claims, plaintiff must demonstrate that defendants were more than merely negligent. I find that plaintiff has failed to do so.

As discussed, supra, when officers Keates and Zimath arrested plaintiff they were presented with information which indicated that plaintiff was a juvenile. Further investigation based on plaintiff's claim that he had a valid driver's license, however, indicated that plaintiff was in fact an adult. Faced

with this situation, defendants determined, incorrectly, that plaintiff was an adult.

Defendants were negligent in determining that plaintiff was an adult. The best course of action would have been to proceed on the assumption that plaintiff was a juvenile, pending further investigation. Such action would have prevented the tragic mistake which was made in this case. However, the officers did make some attempts to verify plaintiff's age, and the record contains no evidence that their actions constituted more than mere negligence. As a result, plaintiff's claim that the individual officers violated his due process rights must fail.

2. Plaintiff's Eighth Amendment Claim

The Eighth Amendment provides prisoners with the right to be free from

attacks by fellow inmates. Riley v. Jeffers, 777 F.2d 143 (3d Cir. 1985). To succeed in this claim, however, plaintiff must demonstrate that officials have shown "deliberate indifference" to his safety. Id. As discussed supra, the actions of the named individual defendants were merely negligent; thus, plaintiff's eighth amendment claim also must fail.

3. Plaintiff's federal statutory claim

Section 1983 provides not only a private right of action for constitutional violations, but also for certain "claims based on purely statutory violations of federal law" by state actors. Maine v. Thiboutot, 448 U.S. 1 (1980). To recover for such a statutory violation, plaintiff must demonstrate that the federal statute in question creates an enforceable right. Pennhurst

State School and Hospital v. Halderman, 451 U.S. 1 (1981) ("Pennhurst I").

The Supreme Court has held that where a statute creates an entitlement program, a private right enforceable under section 1983 exists. Thiboutot, 448 U.S. 1. In contrast, where a statute "does no more than express a congressional preference for certain kinds of treatment," no private enforceable right exists. Pennhurst I, 451 U.S. at 19. The Juvenile Justice and Delinquency Prevention Act (the "Act"), 42 U.S.C. secs. 5633(a)(12)-(14), provides that in order to obtain the federal funding made available under the Act, a state must not incarcerate juveniles in any institution in which they would have regular contact with

adults.[1] In enacting subsections 12 through 14 of the Act, Congress conferred a particular benefit on a distinct class: the class of juvenile detainees. Hendrickson v. Griggs, 672 F. Supp. 1126, 1135 (N.D. Iowa 1987). I find that "the benefits Congress intended to confer on [juveniles] are sufficiently specific and definite to qualify as enforceable rights," Wright v. Roanoke Redev. & Housing Authority, 479 U.S. 418, 432 (1987), and the Act creates a private right of action under section 1983.

I cannot, however, find that in enacting this statute Congress intended to extend this private right of action to cover suits against individual arresting officers such as defendants Keates and

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[1] The statute contains limited exceptions no relevant here.

Zimath. The Act simply sets forth the prerequisites with which state agencies must comply to obtain certain federal funds. As a result, I find that Congress intended to provide a private right of action only against state and/or local agencies eligible for funding under the Act.[2]

Moreover, even if the Act did create a private right of action against individual police officers within the meaning of Section 1983, defendants Keates and Zimath are protected from liability by a qualified immunity. Qualified immunity is available unless the official "knew or reasonably should have known" that his actions would

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[2] As discussed supra, plaintiff has failed to submit evidence regarding a government policy. As a result, plaintiff cannot succeed in a claim against the municipal defendants.

violate the plaintiff's rights. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). Here, the question of whether the Act creates a right in favor of individual plaintiffs is a difficult one. The answer is not one that individual officers reasonably should have known.

An appropriate order follows.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 89-1881 and 89-1928

JOHN DOE,

Appellant, No. 89-1881

v.

BOROUGH OF CLIFTON HEIGHTS; ROBERT KEATES, POLICE CORPORAL, #4; POLICE OFFICER ZIMATH; RICHARD ROE, #1, Police Officers of the Borough of Clifton Heights; DELAWARE COUNTY PRISON; KENNETH MATTY and W. DAVID JONES

JOHN DOE

v.

BOROUGH OF CLIFTON HEIGHTS; POLICE CORPORAL ROBERT KEATES, #4; POLICE OFFICER ZIMATH; RICHARD ROE, #1, Police Officers of the Borough of Clifton Heights; DELAWARE COUNTY PRISON; KENNETH MATTY and W. DAVID JONES

Borough of Clifton Heights; Police Corporal Rpbert Keates, #4; and Police Officer Zimath,

Appellants, No. 89-1928

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 88-8562)
District Judge: Marvin Katz

Argued April 4, 1990

Before: HIGGINBOTHAM, Chief Judge, COWEN and NYGAARD, Circuit Judges

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JUDGMENT ORDER

After consideration of the contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. Each party to bear its own costs.

ATTEST: By the Court:

/s/Sally Mrvos, Clerk /s/Robert E. Cowen, CIRCUIT JUDGE

Dated: April 13, 1990

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 88-8562)
District Judge: Marvin Katz

SUR PETITION FOR REHEARING

Before: HIGGINBOTHAM, Chief Judge; SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCITICA, COWEN and NYGAARD, Circuit Judges

The petition for rehearing filed by appellant, John Doe, in the above-entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court

in banc, the petition for rehearing is denied.

By the Court:
/s/Robert E. Cowen,
Circuit Judge

Dated: June 7, 1990

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

Section 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

Section 5633. State Plans.

(a) Requirements. In order to receive formula grants under this part, a State shall submit a plan for carrying out its purposes applicable to a 3-year period. . . . In accordance with regulations which the Administrator shall prescribe, such plan shall --

* * *

(14) provide that, beginning after the five-year period following December 8, 1980, no juvenile shall be detained or confined in any jail or lockup . . ..

* * *